IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-1-2006

Coram

The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

Second Appeal No.651 of 1995

Lingappa Gounder ... Appellant/Plaintiff

Vs.

1. Palanisamy Gounder
2. P.Shanmughasundaram
3. Patchiammal
4. Velusamy Gounder
5. Krishnamoorthy ... Respondents/Defendants 1,3,6,4,5

This second appeal has been filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 6.3.1995 made in A.S.No.136 of 1994 on the file of the Additional District Court, Erode, reversing that of the Trial Court dated 22.11.1993 in O.S.No.764 of 1987 on the file of the I Additional District Munsif Court, Erode.

For Appellant : Mr.V.S.Sivasundaram for Mr.R.G.Narendhiran

For Respondents : Mr.M.M.Sundaresh for RR 1 to 3 R4 and R5 NDW

J U D G M E N T

The appellant herein is the Plaintiff in O.S.No.764 of 1987 on the file of the I Additional District Munsif Court, Erode, who challenges the judgment and decree of the learned Additional District Judge, Erode, in A.S.No.136 of 1994 dated 6.3.1995 reversing that of the Trial Court in O.S.No.764 of 1987 dated 22.11.1993. Respondents 1 to 5 herein are defendants 1, 3, 6, 4 and 5 respectively in the original suit. Respondents 4 and 5/defendants 4 and 5 are given up as they were set exparte in the first appellate Court.

2. The plaintiff filed the suit for declaration and for permanent injunction. The brief facts as could be seen from the plaint and written statement are as follows.

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(a) The cart track in old survey No.940/3 and re-survey No.1074 is the suit property. The plaintiff purchased 84½ cents of land in old survey No.940/3 and re-survey No.1074/2 along with the right of using the said cart track and since then he is using the cart track. Plaintiff had no other cart-track to approach his property. By sale deed dated 28.4.1984, defendants 1 to 3 purchased the property lying north to plaintiff's property to which the suit cart-track is shown as western boundary. In further north, lies the property of the 5th defendant. It is alleged that as the defendants 1 to 3 were not in good terms with the plaintiff, they were attempting to cut and encroach the cart-track. It is specifically alleged that on 12.7.1987, the defendants 1 to 3 prevented the plaintiff from using the cart-track. As the defendants have no manner of right to do so, the plaintiff filed the suit for declaration and for consequential permanent injunction. As the defendants 4 and 5 have also right over the cart-track, they were impleaded as necessary parties to the suit.

(b) In the written statement filed by the defendants 1 to 3, adopted by defendants 4 and 6, it is contended that as per the Tamil Nadu Land Survey and Boundaries Act, the suit is not maintainable; that in the year 1980, the suit property was re-surveyed and the same was published in the Government Gazettee dated 28.8.1980, in which the suit cart-track did not find a place; and that during re-survey, the plaintiff had not made any objection regarding the suit cart-track and hence the suit should have been laid only against the Land Survey Department. It is also contended that the suit cart-track ends with the southern side of defendants's property; that during 1956 when the Lower Bhavani Project was introduced, the suit property was affected and the itteri (narrow path between two fields) was also used along with the suit cart-track for taking the carts; and that the predecessors of the defendants gave 20 cents of lands to the predecessors of the plaintiff in lieu of the suit cart-track and hence the plaintiff had no right over the suit cart-track. It is further contended that the brother of the defendants is the vendor of the plaintiff, at whose instance the suit is filed with ulterior motive. The defendants categorically stated that they alone are entitled to the suit cart-track and denied the allegation that they attempted to prevent the plaintiff from using the suit cart-track. It is also submitted that the defendants 4 and 5 have no right over the suit property and they are unnecessary parties to the suit.

3. On the above pleadings the trial Court framed five issues and one additional issue. On behalf of the plaintiff Pws.1 and 2 were examined and Exs.A- to A-4 were marked. On behalf of

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the defendants the first defendant was examined as DW-1 through whom, Exs.B-1 to B-10 were marked. Apart from these, the Commissioner's report and plan were marked as Exs.C-1 and C-2.

4. The Trial Court, after considering the materials available on record and after hearing both sides, decreed the suit as prayed for by its judgment dated 22.11.1993, against which the defendants 1, 3 and 6 preferred A.S.No.136 of 1994 on the file of the Additional District Court, Erode. The learned Additional District Judge, Erode, by his judgment dated 6.3.1995, placing reliance on the Commissioner's report and plan Exs.C-1 and C-2, allowed the appeal and set aside the judgment of the Trial Court on the ground that the plaintiff has not legally proved his right over the suit cart-track. It is as against the said conclusion of the first appellate Court, the plaintiff is before this Court.

5. The second appeal was admitted on the following substantial question of law,

> "Whether the lower appellate Court erred in law in holding that the appellant/plaintiff has not proved the existence of cart way without applying its judicial mind to the documentary evidence let in under Exs.A-1 to A-3 and the Commissioner's report and plan under Exs.C-1 and C-2 ?"

6. The learned counsel for the appellant during the course of his arguments submitted that the lower appellate Court erroneously set aside the judgment of the Trial Court and therefore the same is bound to be restored. In support of his submissions the learned counsel submitted that in Ex.A-1 viz., sale deed dated 29.8.1986, by which the plaintiff purchased the suit property, there is a clear recital to the effect that the plaintiff purchased the 84½ cents in Old Survey No.940/3 and re-survey No.1074/2 in Sivagiri village, Erode Taluk, Periyar District, along with the standing trees, the usufructs therein and the irrigation rights of the lands, including the easementary rights to use the cart-track running south-north for taking vehicles and cattles and to use the same as pathway. The learned counsel further pointed out that the parent document viz., Ex.A-2 dated 16.9.1980 also describes the existence of the cart-track and the right of the purchaser to use the said cart track for movement of cattles and also use the same as pathway. It is further pointed out that Ex.A-3 Sale Deed dated 28.4.1984 also mentions about the common cart track and therefore, the existence of common pathway as found by the Commissioner in his report Ex.C-1 is beyond any doubt. The learned counsel further argued that the contention of defendants 1 and 3 made in the written statement that re-survey of Sivagiri Village was pleaded and notified in the

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District Gazettee dated 28.8.1980 as per the provisions of the Tamil Nadu Survey and Boundaries Act, 1923, and in that, the existence of the suit cart-track does not find a place, will not hold good, as the predecessors-in-title of the plaintiff were not issued with any notice under Section 9(1) of the Tamil Nadu Survey and Boundaries Act, 1923. In view of non-issuance of the statutory notice, according to the learned counsel, the completion of re-survey as notified on 28.8.1980, will not bind the plaintiff and the same cannot be put against the rights of the plaintiff. The learned counsel further argued that the contention of defendants 1 and 3 that the predecessors-in-title of the plaintiff and the defendants entered into an arrangement under which the predecessor-in-title of the defendants 2 and 3 were allowed to annex the itteri along with their share without giving any right in the itteri to the predecessors-in-title of the plaintiff and in turn, the plaintiff's predecessors-in-title were given an extent of 20 cents from out of the share of the predecessors-in-title of defendants 2 and 3 and consequently the owners of the plaintiff's share discontinued to enjoy the suit itteri eversince 1956 and that the suit cart track has been exclusively used by the defendants and their predecessors-in-title, cannot be accepted due to the reason that the alleged giving of 20 cents is totally a false story. Learned counsel submitted, as per section 19 of the Indian Registration Act, the Value of the property involved is above Rs.100/- and the same has to be compulsorily registered to convey the title. In the absence of any registered document to show that the predecessors-in-title of the defendants gave 20 cents to the predecessors-in-title of the plaintiff, the alleged transfer of 20 cents cannot be accepted. Therefore, the counsel submitted that the existence of common pathway having been admitted by the defendants themselves, based on which the Trial Court arrived at the conclusion, is perfectly legal and the findings given by the lower appellate Court for setting aside the well considered judgment of the trial court are unsustainable.

7. The learned counsel for the respondents in reply submitted that for giving up the right in the common pathway by the predecessors-in-title of the plaintiff, they obtained 20 cents of land from the predecessors-in-title of the defendants 2 and 3 and consequently the right of the plaintiff to claim the cart-track as common cart-track is unsustainable. The learned counsel further submitted that the notification having been issued as early as on 28.8.1980, after completion of the resurvey under section 18 of the Tamil Nadu Survey and Boundaries Act, 1923, and as the suit cart track does not find a place in the re-survey plan, without challenging the said re-survey, the present suit is not maintainable, particularly when the plaintiff purchased the property after the said notification. Learned counsel further argued that the Commissioner's report Ex.C-1 also supports the

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case of the defendants and therefore the decision rendered by the first appellate court is legal, valid and prayed for dismissal of the second appeal.

8. I have considered the submissions made by the learned counsel for the appellant as well as respondents. The point in issue is whether there existed a common cart-track and the appellant/plaintiff was entitled to get permanent injunction restraining the defendants and their men from interfering in any manner either in the cart-track or in the user of cart track by the plaintiff in taking any vehicles, cattle and using the same as pathway. The Trial Court considered the relevant documents, particularly Ex.A-1, Ex.A-2, Ex.A-3 as well as Ex.C-1 and C-2, Commissioner's report and plan and came to the conclusion that the suit cart track was a common cart-track. The contention raised by the learned counsel for the respondents that in the Gazettee notification dated 28.8.1980, issued subsequent to the re-survey conducted under the Tamil Nadu Survey and Boundaries Act, 1923, the cart track does not find a place and therefore the plaintiff cannot maintain the suit, without challenging the said notification is unsustainable in view of the fact that the notice under section 9(2) of the said Act was not issued to the predecessors-in-title of the plaintiff and that no documentary or oral evidence was let in to show that such a notice was issued to the predecessors-in-title of the plaintiff.

9. In the decision of this Court reported in 97 Law Weekly 198 (Paramakudi Sri Sundararaja Perumal Devasthanam v. S.K.C.Kanakasabapathy Chettiar and others), this Court considered the scope and ambit of Section 13 of the Tamil Nadu Survey and Boundaries Act, 1923 and also about the issuance of notice under Section 9(2) to the parties concerned. Relying upon the earlier decisions of Division Bench as well as the single Judge of this Court, held that where the party affected had no notice of the survey as contemplated by Section 9(2) of the Madras Survey and Boundaries Act, it cannot be said that there has been a completion of the survey in accordance with the orders passed under Section 9 within the meaning of Section 13 and, therefore the party adversely affected thereby is not bound to file a suit within three years to set aside the order of the survey officer. Thus, this Court held that the question of title cannot be decided by the survey authorities finally and conclusively and even if an indirect decision is rendered by the survey authorities, the finality under section 13 will arise only if the notice of the proceedings has been served on the affected party as contemplated under Section 9(2) of the Act. In the said judgment, an earlier Division Bench decision of this Court reported in ILR 1553 Madras 158 = 65 Law Weekly 364 (Mariyam Umma v. Ummer Kutti) was also relied on.

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10. In an another Division Bench decision of this Court reported in 1974 TLNJ 145 (State of Madras v. Kasthuri Ammal and others), it is held that though in an earlier survey one portion of the suit site might have been labelled as a road poramboke, such action by the survey authorities cannot affect the plaintiff in any manner unless the defendants establish that due notice of the result of the survey was given and the latter acquisced in the correctness of the operations. The law is that a party concerned by an adverse survey to whom no notice of the survey was given is not bound to file a suit within three years to set aside the order of the survey officer because he had no notice of the survey, and the orders on it cannot be said to be correctly passed under Section 13 of the Act and binding on the party.

11. From the decisions referred to above, which are also relied on by the Trial Court, this Court is of the considered view that non-mentioning of existence of the common cart-track in the re-survey will not in any way affect the rights of the plaintiff as it is not proved that notice was issued by the Survey Authorities as required under Section 9(2) of the Tamil Nadu Survey and Boundaries Act, 1923, to the predecessors-in-title of the plaintiff.

12. The second contention raised by the learned counsel for the respondents/defendants is that though the existence of common cart-track is admitted, the right of enjoyment of the same by the appellant/plaintiff had been lost, due to giving up of the said right by the predecessors-in-title of the plaintiff by accepting 20 cents of land from the predecessors-in-title of the defendants, even prior to 1956. As rightly contended by the learned counsel for the appellant/plaintiff, no document was produced to prove the said case of the respondents/defendants. Also, it is neither the case pleaded in the written statement nor in the oral evidence of the first defendant. In the cross examination DW-1 admitted that he was not aware of the date, month and year and before whom the said arrangement/settlement was effected. DW-1 had also admitted that the land value was roughly about Rs.50,000/- to Rs.60,000/- per acre and that of one cent would be around Rs.500/- to Rs.600/-. From the above statement of DW-1 it is clear that the 20 cents of land allegedly settled in favour of the predecessors of the plaintiff by the predecessors of the defendants 2 and 3, was worth more than Rs.100/- and admittedly the said transaction was not registered. Section 17 of the Indian Registration Act contemplates that the interest on immovable properties, more than Rs.100/-, are transferable only through a registered document. Even the unstamped and unregistered document is not admissible in evidence as per the decision of a Division Bench of this Court reported in 2005 (1) Law Weekly 343 (R.Deivanai Ammal (Died) &

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Another v. G.Meenakshi Ammal and others), wherein in paragraph 23, the Court relied on the earlier Division Bench decision reported in 2001 (1) CTC 112 (Lakshmipathy, A.C. v. A.M.Chakrapani Reddiar). In another decision reported in 1991 (1) CTC 361 (Ranganatha Gounder v. Perumal Nattar), this Court held that a document compulsorily registerable, if not registered, is inadmissible in evidence. In the said decision the learned single Judge followed the Division Bench decisions reported in ILR (20) Madras 367 (Rangayya Appa Rau v. Kameswara Rau) and AIR 1972 Calcutta 190 (M.S.Ram Singh v. B.S.Surana).

13. It is also to be noted that even if the exchange of 20 cents was made orally in lieu of the right of enjoyment of the cart track, by the predecessors-in-title of the defendants in favour of the predecessors-in-title of the plaintiff, followed by delivery of possession as claimed, mutation of revenue records is mandatory. In this connection, the decision reported in AIR 1990 Punjab and Haryana 89 (Bhagwan Kaur v. Ranjit Singh) can be usefully referred to. In the said decision it is held that the exchange of property can be made orally followed by delivery of possession and the same can be accepted if entries are made in the mutation register. In the case on hand, admittedly there is no entry in the mutation register about the alleged exchange of property. The alleged exchange is said to have been made prior to 1956. Ex.A-1 is dated 29.8.1986 wherein the recitals contain the existence of the suit common cart track. Ex.A-2 dated 16.9.1980, the parent document of Ex.A-1 also describes the existence of the cart track and the right of the purchaser of the land to enjoy the suit cart track. In Ex.A-3 sale deed dated 28.4.1984 also there is a mention about the common cart track. On the contrary, DW-1 merely states that the said recitals are made mistakenly by following the earlier document at the time of registration of those documents. In addition to that, there is no pleading to the effect that mutation of record had taken place at any point of time after the alleged giving of 20 cents by the predecessors-in-title of the defendants in favour of the predecessors-in-title of the plaintiff in lieu of giving up of the right of enjoyment of the common cart track. Hence the contention of the defendants that the appellant/plaintiff cannot maintain the suit in view of the giving up of the right by their predecessors-in-title, is clearly unsustainable and on that score also the findings given by the lower appellate Court is unsustainable.

14. The third contention raised by the learned counsel for the respondents/defendants that the Commissioners plan Ex.C-2 does not contain the common pathway was also dealt by the trial Court and a specific finding was given in so far as the non-existence of alternative cart track and the existence of the suit cart track. In the plan submitted by the Commissioner, the existence of the

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suit cart track is clearly mentioned. A perusal of Exs.C1 and C2, Commissioner's report and plan clearly establishes the necessity of the appellant/plaintiff to file the suit. The respondents/defendants accepted the Commissioner's report as no objection thereto was filed. As per Order 36 Rule 9 of Code of Civil Procedure, the Commissioner's report is an evidence. Taking all these into consideration, I hold that the findings given by the learned Trial Judge that the suit cart track is a common cart track is perfectly legal and valid in the light of the materials on record. Consequently I hold that the appellant/plaintiff is entitled to get the relief sought for in the plaint.

15. For the foregoing reasons, I am of the considered view that the judgment and decree of the lower appellate Court are liable to be set aside and that of the Trial Court are to be restored.

16. In the result, the second appeal is allowed. The judgment and decree of the lower appellate Court in A.S.No.136 of 1994 dated 6.3.1995 are set aside and that of the Trial Court in O.S.No.764 of 1987 dated 22.11.1993 are restored. No costs.

vr

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Additional District Judge, Erode (with records)

2. The Ist Additional District Munsif, Erode.(with records)

3. The Record Keeper, VR Section High Court, Madras.

+ 1 cc to Mr.R.G. Narendhiran, Advocate SR no.3117

GM(CO)
SR/17.2.2006

Judgment in

S.A.No. 651 of 1995

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